STATE OF MICHIGAN

COURT OF APPEALS

ROBERT C. HORVATH,

Plaintiff-Counter-Plaintiff-Appellant,

v

FRED KEMPSTER,

Defendant-Counter-Plaintiff-Appellee.

and

KENNETH FREUND and FREUND FOUR LIMITED PARTNERSHIP,

Intervening Defendants-Counter-Plaintiffs-Appellees.

UNPUBLISHED
December 5, 2006

No. 264035
Oakland Circuit Court
LC No. 1999-017537-CH

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff Robert Horvath appeals as of right from the trial court's orders quieting title in certain real property in intervening third-party plaintiffs[1] Kenneth Freund and Freund Four Limited Partnership (referred to collectively herein as "Freund"), and denying plaintiff a default judgment against defendant Fred Kempster imposing an equitable mortgage on that same property. We affirm.

A number of plaintiffs' issues on appeal reiterate his contention that the trial court erred in determining that plaintiff failed to state a claim for an equitable mortgage on, and that Freund is entitled to quiet title of, the property. We disagree.

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[1] This Court's docket sheet identifies these parties as intervening defendants-counter-plaintiffs. However, these parties intervened in the action below as intervening third-party counter-plaintiffs.

This issue was raised before and decided by the trial court. Therefore, it is properly preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This Court reviews equitable determinations regarding interests in land de novo and the findings of fact in support of those equitable decisions for clear error. *Richards v Tibaldi*, ___ Mich App __, ___NW2d ___; 2006 WL 3028255 (October 24, 2006), slip op, p 4; *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997); *Gorte v Dept of Transp*, 202 Mich App, 161, 165; 507 NW2d 797 (1993); *Grant v Van Reken*, 71 Mich App 121, 125; 246 NW2d 348 (1976). This Court also reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8). *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005).

Generally, there are two types of circumstances that support establishment of an equitable mortgage. First, "[e]quity will create a lien only in those cases whether the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled." *Cheff v Hann*, 269 Mich 593, 598; 257 NW 894 (1934). As our Court has more recently reasoned, because a mortgage constitutes an interest in land within the meaning of the statute of frauds, MCL 566.106, equity cannot be used to avoid the writing required by the statute, absent fraud, accident, or mistake. *Burkhardt v Bailey*, 260 Mich App 636, 659, 680 NW2d 453 (2004). In *In re Estate of Moukalled*, 269 Mich App 708, 721-722; 714 NW2d 400 (2006), for example, this Court determined that imposition of an equitable mortgage was appropriate where documents drafted and duly executed by the parties evidencing an intent that property would serve as security for certain promissory notes were ineffective to accomplish that purpose. In so ruling, this Court specifically noted the parties' "mutual mistake of law in preparing an [unenforceable] agreement." *Id.* However, in *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133, 138; 657 NW2d 741 (2002), this Court declined to impose an equitable mortgage where the original mortgagee failed to require that plaintiff, a joint tenant with full rights of survivorship, be included as a mortgagor on the property. This Court explained that:

> the only equity defendant seeks to have done here is to save [it] from the mistake of the original mortgagee in not insisting that plaintiff pledge his interest in the property to secure the loan, a mistake that defendant could easily have discovered by comparing the names on the deed with the names on the mortgage before it purchased the mortgage. We think it is insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender. [*Id.* at 139-140.]

Additionally, "[i]n the absence of a written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece of property as security for a debt" and where imposition of such a lien is supported by "considerations of right and justice, based upon those maxims which lie at that foundation of equity jurisprudence." *Senters v Ottawa Savings Bank*, 443 Mich 45, 53; 503 NW2d 639 (1993); *Kelly v Kelly*, 54 Mich 30, 47; 19 NW 580 (1884). As our Supreme Court explained in *Cheff, supra* at 598:

> In order to lay the foundation for an equitable lien upon real estate, there must be a contract in writing out of which the equity springs, including an intention to make particular property identified in the written contract security for

> the debt or obligation, or whereby it is promised to assign, transfer, or convey the property as security. In the absence of such written contract, equity from the relations of the parties may declare an equitable lien out of considerations of right and justice based upon the fundamental principles of equity jurisprudence, such as cases where one joint owner improves property for the benefit of both; where a party innocently makes permanent improvements and repairs which presently enhance the value of the property; but in all cases, the person seeking to establish the lien must show that in equity, in good conscience, he is entitled to the lien claimed. [Citations omitted.]

In *Kelly*, *supra* at 47-48, our Supreme Court declined to impose an equitable lien in favor of a son who paid mortgages owing on his father's land, in exchange for his father's promise to convey the land to him. The Court explained that:

> In order to lay the foundation for an equitable lien upon real estate there must exist-First, a contract in writing out of which the equity springs, sufficiently indicating an intention to make some particular property, therein identified, a security for the debt or obligation, or whereby the party promises to convey or assign or transfer the property as security. Pom.Eq.Jur. § 1235. The intent to give security being clear, equity will treat the instrument as an executory agreement to give security. In the case before us there is no agreement in writing, and there is nothing in the verbal agreement which indicates an intention to give security. Or, second, in the absence of such contract, where, from the relations of the parties, equity will declare a lien out of considerations of right and justice, based upon those maxims which lie at the foundation of equity jurisprudence. Such are the cases when one joint owner, acting in good faith, and for the joint benefit, makes permanent improvements upon the property which add a permanent value to the estate; or when a party, innocently and in good faith, supposing himself to be the owner, makes permanent improvements or repairs, which permanently enhance the value of the property, the real owner, when he seeks the aid of equity to establish or enforce some equitable right or claim to the property, upon the principle that he who asks equity must do equity, will be required to pay the amount expended. So with regard to what are known as partners' liens. But in all such cases the foundation for relief must be laid in the bill, and the complainant must set out such a state of facts and circumstances, and prove them on the hearing, as shows that in equity and good conscience he is entitled to the relief prayed for. That has not been done in this case. The complainant sets forth no case except of a verbal contract broken, or at least not performed by himself, and he does not make a case by his proofs which calls for equitable interposition. The contract set out, being void under the statute of frauds, cannot be used as the foundation of any legal or equitable right. If a party pays money under such a void contract he may recover it back in assumpsit, but a court of equity will not create a lien upon real estate in favor of the party paying, unless, from the nature of the transaction, rights have sprung up which ought to be held binding upon the specific property. [*Id.*]

In *Van Camp v Van Camp,* 291 Mich 688; 289 NW297 (1939), our Supreme Court upheld the imposition of an equitable lien in favor of a son, on land owned by his mother, based on an agreement between them that the plaintiff son would "work the farm on a share and share alike basis and upon [the mother's] death he was to receive the farm subject to the payment to his brother and two sisters of $200 each." After the plaintiff worked the farm for several years, performing such tasks as constructing and repairing buildings and fences and clearing stones, the mother conveyed the property to her other three children, "the only consideration for such conveyance being love and affection," and attempted to evict plaintiff from the property. *Id.* at 298, 300. The Court concluded that, "[u]nder such circumstances, the [lower court] did not exceed its powers in fastening a lien upon the premises to secure plaintiff's claim [for damages resulting from his mother's breach of their agreement] and to prevent [his mother] from committing a fraud upon [him]." *Id.* at 300.

As this Court summarized, in *Schultz v Schultz,* 117 Mich App 454, 459; 324 NW2d 48 (1982):

> The demand for writing in the statute of frauds "was intended for persons dealing with each other at arm's length and on equal footing." Thus, a review of Michigan case law reveals two instances in which it is proper to declare an equitable mortgage in order to circumvent the requirement for a writing. One such instance occurs when the deed is between parties where one party stands in a relationship of trust or guidance to the other party, such as attorney to client, guardian to ward, or parent to child, and the relationship has been abused. In that situation, a court may declare a deed to be subject to an equitable mortgage where the deed would have been held to be unencumbered had the parties not been so related.
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> The other instance in which equitable mortgages may properly be declared occurs when a creditor abuses that "power of coercion" which he may have, by the force of circumstances, over the debtor. Courts sitting in equity interfere between the creditor and debtor to prevent oppression. Otherwise, the statute of frauds would become "a shield for the protection of oppression and fraud." As has been observed, an oppressed debtor "will not hesitate to execute a deed or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan without insisting upon a written deed of defeasance." Thus, an adverse financial condition of the grantor coupled with an inadequate purchase price for property is sufficient to establish a deed absolute on its face to be an equitable mortgage. [Citations omitted.]

At no time in the instant case has plaintiff asserted accident or mistake as a basis for his claim to an equitable mortgage. As to fraud, plaintiff's initial complaint alleged only that defendant breached the contract between the parties by "fail[ing], refus[ing] and neglect[ing] to execute" and deliver the security documents. Failing to comply with a future promise to perform as contracted does not constitute fraud. *Hi-Way Motor Co v Inter'l Harvester Co,* 398 Mich 330, 336; 398 NW2d 813 (1976). Stated differently, defendant's "[f]ailure to carry out a promise to do a future act does not constitute actionable fraud; instead, the remedy, if any, lies in a suit for breach of contract." *Michigan National Bank v Holland-Dozier-Holland Sound Studios,* 73 Mich App 12, 18; 250 NW2d 532 (1976). Indeed, breach of contract is the action that plaintiff brought

against defendant. Further, plaintiff does not allege a relationship between himself and defendant of the nature described in *Kelly* and *Van Camp*, warranting special consideration. Thus, the trial court did not err in granting Freund summary disposition on its claim for quiet title, based on the allegations set forth in plaintiff's initial complaint.

Plaintiff argues, however, that the allegations set forth in the second amended complaint warrant imposition of an equitable mortgage. According to plaintiff, the trial court should have granted him a default judgment on count 3 of the second amended complaint, imposing an equitable mortgage on the property irrespective of its earlier rulings, or it should have reconsidered its earlier determination that Freund was entitled to quiet title.

While the allegations in plaintiff's second amended complaint are more detailed than those in the first, and specifically include that defendant executed the security documents and promised to deliver them without intending to do so, plaintiffs' claim continues to rest on the assertion that defendant failed to perform a promised future act – the delivery of executed security documents to plaintiff. As such, these allegations also do not establish that defendant fraudulently induced plaintiff to act in a manner that deprived him of his security interest sufficient to warrant imposition of an equitable mortgage. Plaintiff merely alleges that he had an agreement with defendant whereby defendant was to deliver an executed mortgage, that plaintiff performed before defendant did so, and that despite his representation otherwise, defendant failed to meet his obligation to do so. Plaintiff is an attorney and real estate broker, who was aware that defendant was in a precarious financial situation. Despite this, plaintiff allegedly performed services before ensuring that defendant would perform as contracted. As in *Townsend*, *supra* at 138, "it is insufficient to invoke equity to save [plaintiff] from his own mistake." Thus, plaintiff's remedy properly sounds in breach of contract. *Kelly*, *supra* at 48; *Holland-Dozier-Holland Sound Studios*, *supra* at 18. Indeed, the trial court has entered judgment against defendant on that claim.

Plaintiff cites our Supreme Court's decision in *Schrot v Garnett*, 370 Mich 161; 121 NW2d 722 (1963), as supporting his claim that his provision of services upon defendant's promise to grant him a lien on the property warrants imposition of an equitable mortgage. In *Schrot*, "[t]o get his urgently supplicating client out of jail, the plaintiff attorney agreed with the client to pay certain of the [client's] child support arrearages . . . on strength of the client's promise to execute in [the plaintiff's favor] a mortgage of the client's home." *Id.* at 162. The plaintiff paid the arrearages, but the client, once released, refused to execute the mortgage. The Court determined that the plaintiff was entitled to an equitable mortgage, it being clear that there was intent to give identifiable security in the property, the plaintiff acted in reliance upon that intent, and the relation of the parties and "considerations of right and justice" warranted such imposition. *Id.* at 163-164.

Schrot is distinguishable from the instant case. In *Schrot*, the plaintiff's performance was time sensitive; his client's confinement made it reasonable to complete payment of the arrearages before the mortgage was executed. No such factor is alleged here. That is, there is no apparent reason that plaintiff should have provided the services rendered before receiving the executed security documents. Further, the relationship between the parties in *Schrot* was other than that of ordinary contracting parties, and as such, justifies imposition of the equitable mortgage under the circumstances described. Here, plaintiff alleges that he trusted defendant because defendant was a long-standing friend of plaintiff's estranged father. However, plaintiff was also aware of the

precarious nature of defendant's financial situation, and that defendant was denied financing for his development project. Still plaintiff undertook his own performance without first verifying that defendant executed and delivered the security documents. Further, plaintiff filed the instant action a mere three days after plaintiff sent the security documents to defendant, which was the same day defendant purportedly advised plaintiff that he had duly executed them. These circumstances, which establish a breach of contract and, perhaps, imprudent action by plaintiff, do not warrant imposition of an equitable mortgage arising from some special relationship between plaintiff and defendant.

In sum, plaintiff and defendant had an agreement whereby defendant promised to undertake some future act – to execute and deliver a mortgage securing payment for services rendered to plaintiff and Reichert Surveying, Inc. While defendant failed to meet his obligations under the agreement, plaintiff has made no showing that defendant made a false statement of existing fact that caused plaintiff to expend efforts in reliance on that statement. Thus, plaintiff has not established fraud. *Hi-Way Motor, supra* at 336; *Holland-Dozier-Holland Sound Studios, supra* at 18. Nor has plaintiff established any exigent circumstances or special relationship warranting equitable intervention as in *Schrot* or *Van Camp*. Thus, plaintiff's remedy properly lies in an action for breach of contract. *Holland-Dozier-Holland Sound Studios, supra* at 18. On the facts presented, the trial court did not err in declining to impose an equitable mortgage on the property, or in quieting title to the property in Freund.

Plaintiff also claims that he is entitled to a default judgment against defendant on count 3 of the Second Amended Complaint, which thereby establishes plaintiff's entitlement to an equitable mortgage.[2] We disagree.

This issue was raised before and decided by the trial court. Therefore, it is properly preserved for appeal. *Fast Air, supra* at 549. We review equitable determinations regarding interests in land de novo. *Richards, supra,* slip op, p 4; *LaFond, supra* at 450.

The entry of a default provides the basis for the entry of a default judgment, by the clerk in limited circumstances, or by the court, as provided in MCR 2.603(B). *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 530; 672 NW2d 181 (2003). However, "entry of a default does not operate as an admission that the complaint states a cause of action. If the complaint fails to state a cause of action, it will not support a judgment." *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981), citing *Hofweber v*

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[2] Plaintiff also contends that Freund is barred from arguing against plaintiff's appeal on this issue because Freund did not cross-appeal the trial court's determination that it lacked standing to contest the allegations of the second amended complaint. Nonetheless, we review the trial court's determination against plaintiff de novo, *Johnson-McIntosh, supra* at 322, and we do so, regardless of whether Freund is entitled to respond. Further, Freund is entitled to respond to plaintiff's arguments to the extent that those arguments challenge the trial court's decision in Freund's favor on the quiet title issue.

Detroit Trust Co, 295 Mich 96; 294 NW 108 (1940). Where the complaint fails to state a claim upon which relief can be granted it will not support entry of a judgment obtained by a default. *Id.*; *Hunley v Phillips,* 164 Mich App 517, 523; 417 NW2d 485 (1987).

Thus, the effect of defendant's failure to respond to the second amended complaint was to admit the well-pled factual allegations contained therein, as between plaintiff and defendant; defendant's default did not necessarily entitle plaintiff to a judgment. As discussed above, the trial court correctly concluded that plaintiff was not entitled to imposition of an equitable mortgage on the property. Therefore, the trial court did not err in denying plaintiff's motion for entry of a default judgment against defendant on count 3 of the second amended complaint.

In a number of issues raised on appeal, plaintiff argues that the trial court erred in granting Freund summary disposition on its slander of title claims for a variety of reasons. We agree that the trial court erred to the extent that its grant of summary disposition to Freund on the counter-complaint encompassed Freund's claims for slander of title.

However, plaintiff was not prejudiced by this error, given the trial court's later determination that Freund was not entitled to any recovery on the claims on the basis that Freund did not establish that plaintiff filed the notice of lis pendens with malice. Freund was not afforded any relief to which it was not otherwise entitled by the trial court's initial ruling. And, the trial court essentially reversed its grant of summary disposition on Freund's slander of title claims by its subsequent denial of any recovery, given the lack of a showing that plaintiff had acted maliciously when filing the lis pendens. Thus, plaintiff ultimately prevailed on these claims and is entitled to no relief on appeal.

Finally, plaintiff argues that "Freund Four Limited Partnership" never filed a partnership certificate with the state, and thus, does not exist as a legal entity, its current name being "Freund Four L.L.C." Therefore, plaintiff argues, Freund Four Limited Partnership cannot be the real party in interest to assert any rights in this case, any claim it presented was a nullity, and the trial court should not have granted Freund summary disposition on its counter-complaint. We disagree.

MCR 2.201(B) requires that, generally, an action be prosecuted in the name of the real party in interest. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55, 95; 535 NW2d 529 (1995); *Kalamazoo v Richland Twp,* 221 Mich App 531, 534; 562 NW2d 237 (1997). It is "a general rule [that] one may not claim standing to vindicate the rights of some third party." *People v Rocha,* 110 Mich App 1, 16; 312 NW2d 657 (1981). Thus, if "Freund Four Limited Partnership" and "Freund Four L.L.C." were separate legal entities, we would conclude that "Freund Four Limited Partnership" would lack standing to assert the legal rights and claims of "Freund Four L.L.C." However, such is not the case. Rather, as noted above, "Freund Four L.L.C." is not a separate and distinct entity from, but was merely misnamed as, "Freund Four Limited Partnership." Thus, the identified intervening third-party counter-plaintiff was at all times the real party in interest in the instant action.

Further, as a general rule, a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties. *Parke, Davis & Co v Grand Trunk Ry System,* 207 Mich 388, 391; 174 NW 145 (1919). Thus, amendment is permissible to correct

such things as the designation of the named plaintiff from "corporation" to "partnership," and to substitute the plaintiffs' full names where their first and middle names had been reduced to initials in the original complaint. *Detroit Independent Sprinkler Co v Plywood Products Corp,* 311 Mich 226, 232; 18 NW2d 387 (1945); *Stever v Brown,* 119 Mich 196; 77 NW 704 (1899). Such is the case here. Where an amendment is permitted merely to correct a prior error in naming the proper party, and where the opposing party has not been denied notice of the action due to this misnomer, the amendment relates back to the date of the original pleading. *Miszewski v Knauf Construction, Inc,* 183 Mich App 312, 316; 454 NW2d 253 (1983).

Plaintiff does not assert any prejudice arising from the misnomer in the Freund entity's name. Nor do we find any basis for him to do so. Plaintiff was aware at all times of the nature and basis of the claims set forth in the counter-complaint against him and his ability to defend those claims was not affected in any way by the counter-complaint's mistake in the name of the Freund entity. Therefore, plaintiff is not entitled to any relief on the basis of this misnomer.

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens